A VERY BAD STATUTE.

The worst criminals have often been defended by able counsel, whose belief in the innocence of their client has been very sincere. With this fact in view, it is not, perhaps, surprising that one of the learned judges of the Orphans' Court for the county of Philadelphia, should dissent from the opinion of the court pronouncing the Act of May 12, 1897, P. L. 56, guilty of serious offences against the Constitution of the State. In calling this statute a very bad one, I do not wish to be understood as condemning it because it is an attempt to lay a tax upon "Direct Inheritances" so-called. The wisdom of such a method of raising revenue may be questioned, but it is undoubtedly quite within the province of the legislature by proper enactment to prescribe it. But this Act is so faulty in construction, so clearly subversive of the principles of law-making, and so flagrantly in conflict with the Constitution, that no condemnatory words could be too strong. Let us consider, *first*, wherein it is unconstitutional. It is unconstitutional in the following particulars:

1. It conflicts with Art. iii., Sec. 3, which directs that an Act shall be upon one subject, clearly expressed in its title.

2. It conflicts with Art. ix., Sec. 1, which directs that taxes shall be uniform, etc.

3. It conflicts with Art. ix., Sec. 2, which forbids exemptions from taxation except in certain cases. And it is generally unconstitutional as being

4. In conflict with the whole intent and purpose of the third article, which is to secure careful, intelligible legislation.

I.

The Act is entitled "An Act taxing gifts, legacies, and inheritances in certain cases, and providing for the collection thereof." As a matter of fact, the Act does *not* tax "inheritances" at all; and it *does* tax "*sales* made in contemplation of the death of the grantor," etc.—a provision not even faintly

suggested by the title. Moreover, unless we are to disregard the plain meaning of the English language, the purpose of the Act is to tax, and *provide for the collection of*, gifts, legacies, and inheritances, in certain cases. Such is not the purpose of the Act; but had it been, it would have been *clearly* expressed by the title. Taking up these three objections to the title in their order: It will certainly not be pretended by any lawyer that "inheritance" is a fitting term to describe a "distributive share under the intestate laws;" itself a well-known term and easily inserted in the title to an Act. And an Act stated in its title to be for the imposition of a tax upon "inheritances" which expressly confines itself to taxing personal property, is absurdly inconsistent. Surely, even without the constitutional provision, it should be insisted that a *law* should be couched in apt words, and the careless, popular meaning of a term should not be accepted any more than in instruments between man and man. *Second.* There is no expression in the title, "clear" or otherwise, of an intention to tax "sales" of any kind; there is nothing in the title to admonish any one that such a transaction is within the purview of the Act. *Third.* As has been said, the title distinctly states one of the purposes of the Act to be the collection of gifts, etc., whereas it simply provides the machinery for the collection of the tax imposed.

Now, is all this "mere verbal criticism?" Strictly, yes. Is it "mere *captious* verbal criticism?" Distinctly, *no.* The wording of the title to an Act has been thought of sufficient importance to justify the insertion of a proviso in the Constitution—the fundamental, organic law of the State—with regard to it. "Mere verbal criticism" is all that a title is susceptible of, and it is not only the right but the duty of the courts and of the profession to subject titles to strict criticism. The words of the constitutional provision (Art. iii., Sec. 3.) are: "No bills, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title." If the words, "which shall be clearly expressed in its title," contain a mandate which cannot be disregarded, does the title "An Act taxing gifts, legacies and inheritances in certain cases, and providing for the collection

thereof" express the real purpose of an Act which might—as far as its substantive provisions are concerned—be expressed thus: "An Act imposing a tax on gifts, legacies, sales, and distributive shares under the intestate laws, in certain cases, and providing for the collection of the said tax?" It is the duty of the legislature to "hew to the line" in obedience to constitutional provisions—quite as much as it is the duty of the executive or of the judiciary—a truth which is often lost sight of, apparently. The legislature is the servant of the people, with most important responsibilities and duties, and clothed for the benefit of the people, with wide powers; but just as amenable to constitutional mandates and bound to strict compliance with them as any other servant of the people. Constitutional restrictions upon legislative power have become more and more numerous as the years have gone on, as the result of past experience—a very significant fact. So true is this, that it has been thought that these restrictions have become too numerous, and as remarked by Mr. Justice Mitchell, dissenting, *Perkins* v. *Philadelphia*, 156 Pa. 569: "In the impatience of the people with some of the evils of special legislation, they have rushed to the other extreme, and so hedged about and bound up the legislative arm of the government that legitimate and necessary powers can be exercised only with difficulty, if at all." We are so accustomed to the now well recognized power and duty of the courts to pronounce upon the constitutionality of a statute, that we are apt to forget that less than a century ago, it was doubted by many, and denied by some, of the ablest judges that there was any such power or duty. In *Eakin* v. *Raub*, 12 S. & R. 330, Mr. Chief Justice Gibson in a long, and of course able, dissenting opinion (written in 1824), expressly denied such power to the courts. But he stated twenty years later, during the argument in *Norris* v. *Clymer*, 2 Pa. 281, that he had changed his opinion for two reasons, "The late convention by their silence sanctioned the pretensions of the courts to deal freely with the Acts of the legislature; and from experience of the necessity of the case." He subsequently declared many an Act unconstitutional! A relic of the same doctrine still obtains, however,

in the refusal of the courts to declare an Act unconstitutional for an alleged neglect on the part of the legislature to conform to formal provisions of the Constitution—Art. iii., Sec. 8, for example—which requires certain classes of Acts to be advertised for thirty days. See *Perkins* v. *Philadelphia*, *supra*—a position, the force of which I never could see—for surely the argument "*ab inconvenienti*" ought not be a shield behind which the legislature can disregard any constitutional provision. But there is no mistaking the sure and steady growth of the intention of the people to keep the legislature well within bounds: And no one familiar with early legislation can wonder at this —the enormities foisted upon the people in the shape of statutes, were often grotesquely absurd.

II.

The Constitution of Pennsylvania, Art. ix., Sec. 1, provides as follows: "All taxes shall be uniform upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; but the general assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity." The first section of the Act, after imposing a tax of two per cent. on certain property, contains two provisos: First, "Provided That personal property to the amount of five thousand dollars shall be exempt from the payment of this tax in all estates;" and second, "Provided, further, That so much of the estates of persons heretofore deceased as has not actually been distributed and paid to persons entitled thereto prior to the passage of this Act, shall be liable to the tax imposed by this law as well as the estates of persons who die hereafter." Do these provisos conflict with Art. ix., Sec. 1, of the Constitution? Let us see what is their effect. A. dies, leaving an estate of $5000 all to one person; no tax is to be levied upon this bequest. B. dies, leaving an estate of $6000 to three persons; each person's share is taxed $6.66—so that he must pay a tax for receiving $2000 simply because the whole estate,

of which his legacy was a part, amounted to more than $5000 —while the legatee under the will of A. gets $5000 free of tax, on account of the (for him) happy accident that his benefactor's whole estate did not exceed that amount. Again, A. dies before the passage of the Act; for some reason his estate is only partially distributed when the Act is passed. A., B. and C. have received their legacies. D. has not received his, though equally entitled to it. The legacy of D. is taxed, and those of A., B. and C. are not. These are not only the indirect effects of the Act, but are its positively and expressly stated purposes. It is to be noted that the learned and distinguished counsel for the Commonwealth, in the argument before the Orphans' Court in banc, did not seriously attempt to prove that this taxation was "uniform." Their contention was, first, that the Act simply "classified" the subject for taxation, making one class of estates over $5000 and parts thereof undistributed at the passage of the Act; and another class of those portions which were $5000 or less, and such parts of estates as had been actually distributed "prior to the passage of this Act." And second,—and this was the plea in "confession and avoidance" most strenuously urged—that as this species of taxation was a sort of excise or license tax upon the right to receive property, and not a tax upon property itself, (see directly *contra*, *Bittenger's Appeal*, 129 Pa. 338) it was not within the scope of constitutional provision as to uniformity of taxation. If either of these contentions be well founded, then the first section of the ninth article of the organic law of the State might as well be expunged—better—for it is idle to retain an utterly nugatory section. If the legislature can discriminate between members of one class and call such discrimination "classification," there is an end to uniformity at once. If the legislature can impose all manner of unjust, discriminating taxes, so long as it does so by means of an "excise, burden, bonus, or assessment," instead of annually, the people are left without protection; for legislative ingenuity will be quite equal to clothing a tax in the form of an excise—which it has not even taken the trouble to do in this case —whenever it shall be necessary to accomplish its purpose.

For example: What is to prevent the imposition of a stamp tax on all deeds left for record which convey property more than three acres in extent? This, according to the Commonwealth's contention, is merely "classifying" real estate into that which is more and that which is less than three acres in extent—and, anyhow, it is an excise tax—levied on the "privilege of taking" the property, and so quite free from constitutional restriction! Without reviewing *in extenso* the cases in Pennsylvania upon the subject of legislative classification for the purposes of taxation—and they are very numerous—it is sufficient to say that there is no case which even hints at the propriety of "classifying" by fixing a line of value or extent. The whole question is fully elaborated in the opinion of the court in *Com.* v. *Del., etc., Canal Co.*, 123 Pa. 594. But we are not without clear and unmistakable authority—if any were needed—against this classification. Mr. Justice Paxson, in *Fox's Appeal*, 112 Pa. 355, in speaking of the exceptions in the Act of 1885, of "notes or bills for work and labor done," other notes being taxed, says: "The exception of notes or bills for work and labor done is clearly a violation of the ninth article of the Constitution. This belongs to a species of class legislation that has become very common, more common than commendable, the object of which is to favor a particular class at the expense of the rest of the community. So far as such legislation affects the question of taxation, the Constitution has put an end to it. There can be no more of it, nor should there be. The Constitution protects all classes alike; the poor and the rich equally enjoy its benefits, and all must share alike the burden which it imposes. However popular such legislation may be, it cannot be sustained under our present Constitution." There is no difference in principle between excepting "notes for work and labor done" and excepting estates or parts of estates less than $5000. If such a thing were permitted, there is no knowing to what proportions it might grow. For it can easily be imagined that a larger exception might be made by subsequent legislation—more "classes" of notes, or "classes" of estates created, until the whole burden of taxation were thrown upon some persons

while others escaped entirely. That there is no likelihood that this sort of legislation would be carried to any great excess, if permitted, is no answer to the argument, even if true in point of fact. The *possibility* of abuses is what must be guarded against; and abundant warnings have been given in the past, that constitutional restraints upon legislation are not only necessary in theory, but in practice.

Absolute uniformity—absolute equality—of taxation, is unattainable. This may be freely conceded; but where by its very terms, an Act of Assembly provides an un-uniform tax—and makes, as here, the un-uniform provision the condition upon which the Act passes—for that is the office of a proviso—it comes directly in conflict with the Constitution: And if it did not, the constitutional provision would be an empty form—*vox et præterea nihil.*

III.

Even if there were no direction as to uniformity of taxation in the Constitution, the exemption of estates and parts of estates less than $5000, would be a clear violation of Sec. 2 Art. ix., expressly declaring void exemptions, except in specified cases: *Fox's Appeal, supra.*

To hold this statute guiltless of offence against Art. ix., Secs. 1 and 2 of the Constitution, the plainest and most elementary rules of constitutional construction must be set aside. It is a fundamental rule of constitutional construction, that the plain meaning of the words should be taken—a constitution would be construed "in its plain, untechnical sense," as Mr. Chief Justice Thompson says in *Page* v. *Allen*, 58 Pa. 338, and repeated warnings have been uttered by the Supreme Court against construing away the meaning of the Constitution—for example, in *Monongahela Nav. Co.* v. *Coons.*, 6 W. & S. 114, Mr. Chief Justice Gibson, says, "A constitution is made not particularly for the inspection of lawyers, but for the inspection of the million, that they may read and discern in it their rights and their duties; and it is, consequently, expressed in the terms which are most familiar to them. Words, therefore, which do not of themselves denote that they are used in a

technical sense, are to have their plain, popular, obvious and natural meaning;" Again, Mr. Justice Woodward, says, in *Chase* v. *Miller*, 41 Pa. 403: "Constitutions above all other instruments are to be read as they are written. Judicial glosses and refinements are misplaced when laid upon them. Carefully considered judicial implications may, indeed, be made from time to time in support of statutes, never to defeat statutes, *when such implications are grounded in the Constitution* and tend to accomplish *its obvious purpose*, as well as to promote the public welfare." And in referring to this very article (Art. ix.) of our present Constitution, Mr. Justice Paxson said in *Fox's Appeal*, *supra*, "This provision of the Constitution is too important and too valuable to be *overridden by the legislature*, or *frittered away by judicial construction.* It was intended to, and does, sweep away forever the power of the legislature to impose unequal burdens upon the people under the form of taxation." He also said "that an Act conflicting with it must fall, no matter what the inconvenience to the State."

Applying these principles, can it be said the words of these sections (Art. ix., Secs. 1 and 2) are equivalent to "all taxes except excises, burdens, bonuses, or assessments," etc.—and "all laws exempting property from taxation—except excises, burdens, bonuses or assessments . . . shall be void. Except that the legislature may exempt property above or below a certain value from taxation, to which other like property may be subjected." This is precisely what is necessary to support the Act—nothing more or less. And a layman may be imagined standing speechless with amazement when he is told that an Act taxing property in express terms and exempting certain property from taxation does not conflict with the Constitution—when he is told that "taxation" in the Act and in the Constitution does not mean the same thing—that "all" in the Constitution does not mean "all"—That while the only authority for the imposition is the taxing power, still for the purpose of his protection, it is *not* a tax—and while, practically speaking, there is deducted from property which would otherwise be his two per cent. of its value, he is quite without protec-

tion against being singled out for this purpose, or being made one of a very small number of similiar sufferers; and if he should also be told that this result has been brought about by judicial decision, that the plain and obvious meaning both of the Act and of the Constitution has been "construed" away, for his undoing, there is no knowing what will be his attitude! But I humbly trust that this last is far from likely to happen. I cannot believe that the courts of this Commonwealth will ever so violate all rules of commonsense and honest interpretation. If they do, the consequences are unimaginable. Much has been said and written about every intendment being made in favor of the constitutionality of an Act of Assembly; but it all amounts simply to this: That the Act like any other alleged criminal is entitled to the benefit of an honest doubt. That the courts should go out of their way to aid the legislature in violating the Constitution, of course, will not be contended for a moment; it is a higher duty to sustain the Constitution than to sustain a statute. So much for the constitutionality of the Act—and by way of transition to the subject of its wretched character, apart from all constitutional questions, I may add that when an Act is faulty and full of imperfections, it is a very good reason for making but little effort to sustain it, if it can constitutionally be set aside. This will be urged more at length, later on.

The distinguished counsel for the Commonwealth in the argument before the Orphans' Court in banc, frankly stated that the Act had been formed by copying the collateral inheritance tax law, *mutatis mutandis*, and adding a little here and there. The trouble about the method of procedure is that unless almost impossible care is exercised, the *mutanda* will not all be *mutata*, and the result will be a highly unsatisfactory jumble. The title to the Act tells us, as we have seen, that it is for the purpose of taxing legacies, etc., and providing for their collection. By a sort of sub-title its last section (Sec. 16) tells us that the law shall be known as the direct inheritance law, and shall not be held to change the collateral inheritance tax law, it being the intention of the Act "to impose a direct inheritance tax on all estates or parts of estates not subject to

the Act or Acts providing for the collection of collateral inheritance taxes." Apart from this—which simply tells how the Act is *not* to be construed, and what its *intention* is—we should never have imagined the Act to be for such a purpose. The first section, by which the tax is imposed, draws *no distinction whatever between lineals and collaterals*, and standing by itself, it would simply impose a tax of two per cent. upon the personalty of all estates no matter whether they passed to lineals or collaterals. And more than this, it expressly imposes this tax upon corporations as well as natural persons. By section 9 it is made the duty of the Register of Wills to appoint an appraiser to value estates subject to *direct inheritance tax.* Thus far in the Act, remember, there is not a word to indicate any distinction between lineals and collaterals. By section 2 interest is expressly imposed upon estates of persons dying, no matter how long ago, if the tax is not paid within one year: See opinion of Penrose. J., *Portuondo's Est.*, 54 Leg. Int. 316, *et seq.* The Act imposes a tax of two per cent. upon personal property passing, etc., without distinction, as we have said, between lineals and collaterals, and exempting estates or parts of estates $5000 or less. Section 16 says it is intended to tax all estates not taxed by the collateral inheritance tax law. This would include: 1. Real estate; 2. The whole estate over $250. So that the Act and its "interpreting sections," so to speak, do not agree. It does *not* do what it is expressly stated that it was intended to do. It *does* do that which it is, inferentially, at least, declared not to intend doing. I say "inferentially" because all that is expressly stated is, that the Act shall be known as the direct inheritance law, the inference being that it only refers to direct inheritances. It is declared that the Act shall not be held to alter the existing law in reference to the collection of collateral inheritance taxes. If this merely means that the Act is not intended as an amendment to the collateral inheritance law, well and good. But if it means that the plain words of the substantive sections of the Act are to be disregarded, the meaning of the language set aside, and a new and strained meaning put on them by the courts, then this is something the legislature has no power to

do. It cannot throw upon the courts the duty of legislation. It cannot in the body of an Act use a convenient form of words and then direct the courts to give these words a wholly different meaning, or to refuse to give them their real meaning. It has been said tim without number that the interpretation of the law is for the court, without instruction from the legislature. It is true that where words are doubtful, and the Act has not been judicially interpreted, prior to the Constitution of 1874, the legislature might have passed an expository Act. But where, as here, the words of the Act are not doubtful (the first section is a perfectly clear imposition of a tax), such an Act, even prospectively, would not have been valid. In *O'Connor* v. *Warner*, 4 W. & S. 223, Mr. Chief Justice Gibson said that "a legislative direction to perform a judicial function in a particular way would be a direct violation of the Constitution, which assigns to each organ of the government its exclusive function and a limited sphere of action:" See, also, *Haley* v. *Philadelphia*, 68 Pa. 45. It is true that the direction to interpret is in a section of the Act to be interpreted, in this case—but in principle, there can be no difference—It is manifestly absurd for the legislature to direct by the last section of an Act, that its substantive sections shall be held to have a meaning their words do not convey. In short, in order to sustain this Act, the court must read out of it express words, and read into it others, so that this Act, as it stands in the statute book, will not express its meaning at all! When this is necessary, an Act must fall of its own weight. A law is a rule of action, and the law-making organ of the government cannot send down a mass of words under the form of an enactment, and throw upon the courts the necessity of making it an intelligible rule. The people of this Commonwealth have prescribed in their Constitution by its third article, great care on the part of the legislature in passing bills. It is required that all bills shall go to a committee, shall be read three times, that no bill shall be amended simply by reference to its title, etc.; and a confused, contradictory, inaccurate enactment, bearing evidence on its face of careless preparation, is a violation of the spirit of the Constitution, although the

letter of it may have been complied with. And in such a case no intendment should be made to sustain an Act—the courts should rather see to it that the Act shall fall if it in any way, no matter how slightly, specifically conflicts with the Constitution. This article is already much too long. I cannot, therefore, do more than mention the attempt to make a substantive clause out of a proviso (the second in the first section of the act), and the fact that in some jurisdictions, under other Constitutions, taxes of this character even when not uniform, seem to have been sustained—the mistakes of others should be no guide to us.

In this age of the world, the law is intended to be a system of rules by which we live, move, and have our being, in civilized communities; not a body of abstract propositions for skilful debate and intellectual exercise among lawyers. "I have left all my property to my rascally nephew in express terms," said a cynical old gentleman the other day, "so as to be sure that he will never get a penny of it." Jests of this sort always have an underlying cause. And they certainly point to a more straightforward, commonsense, practical interpretation of the law, as one of the demands of the people of to-day.

To me, the Act in question seems *facile princeps* among the recent examples of bad legislation, and its contemplation leads me to exclaim "I am sick when I do look on thee!"

Lucius S. Landreth.

Philadelphia, January 1898.